

# Avoiding the Perfect Storm of Juror Contempt

**Professor Cheryl Thomas**

*Professor of Judicial Studies, Director of the UCL Jury Project,  
University College London Faculty of Laws*

☞ Contempt of court; Internet; Jurors; Jury deliberations

## Summary

*Concern over juror contempt and improper conduct is one of the factors that prompted the Law Commission's early review of Contempt of Court. This article argues that any reform of the law of contempt in relation to juries and jury trials should be based on rigorous and reliable empirical evidence, not anecdotal evidence, exceptional cases or untested assumptions about juries. It reports the first findings of recent research conducted with juries at Crown Courts examining juror understanding of contempt, awareness of recent prosecutions of jurors, willingness to report improper conduct, as well as desire for deliberation guidance and written judicial directions. Based on empirical evidence, this article argues for a three-pronged approach to minimising juror contempt in the new media age. It also argues that calls for the removal or relaxation of s.8 of the Contempt of Court Act are misguided and based on a myth that the current law prevents detailed jury research.*

## Improper juror conduct

The Law Commission's early review of Contempt of Court has been prompted in part by concern that new media poses significant challenges to existing laws on contempt of court as they relate to jury trials.<sup>1</sup> The question of whether jurors understand what improper jury conduct is and understand that they must bring any concerns about improper jury conduct to the court's (and only the court's) attention before a verdict is returned is crucial to the proper functioning of jury trials in England and Wales. It is vital in terms of ensuring that no miscarriages of justice occur as a result of the jury process, which may become difficult if not impossible to examine later.<sup>2</sup> It is also important so that jurors avoid committing contempt. One specific type of improper conduct, jurors' improper use of the internet to look for information about their case or communicate information about the case to a third party, is currently the most pressing area of concern and has clear implications for fair trials in this as well as other jurisdictions.<sup>3</sup>

<sup>1</sup> Law Commission of England and Wales, *Contempt of Court: A Consultation Paper* (2012) CP209, Para.1.1-1.2.

<sup>2</sup> *Mirza* [2004] UKHL 2; [2004] 1 All E.R. 925.

<sup>3</sup> For examples of other jurisdictions where juror use of the internet is also recognised as problematic see for instance E. Robinson, "Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media" [2011] 1 *Reynolds Court and Media Law Journal* 307; E. Brickman, J. Blackman, R. Futterman, & J.

In recent years a number of juries have had to be discharged or trials abandoned due to jurors' inappropriate use of the internet.<sup>4</sup> In two cases, jurors' improper use of the internet has resulted in prosecutions and convictions of those jurors for contempt, resulting in significant custodial sentences.<sup>5</sup> The introduction of extraneous, non-evidential material into the jury decision-making process as a result of internet (or other) research runs contrary to well-established principles of criminal justice.<sup>6</sup> As the Court of Appeal noted in *Karakaya*, "it can never be right for the jury to be provided with information that has not been part of the evidence in the trial."<sup>7</sup> To do so would contravene the principles of open justice and fair trials. The defendant as well as the public must have the right to know what evidential material has been considered by the jury in reaching a verdict, and both prosecution and defence must have an opportunity to address in open court all material considered by the jury in reaching its verdict.<sup>8</sup>

### The Perfect Storm of juror contempt

If a specific combination of factors exists in jury trials, it can create the conditions for a "perfect storm"<sup>9</sup> of improper juror conduct. Those conditions are (1) when jurors do not understand that they should not look for information (via the internet or elsewhere) about their case during the trial; (2) when jurors find such information and share it with other members of the jury; and (3) where, even if other jurors know this behaviour is wrong, they are unwilling or do not know what to do to ensure that any verdict they return is fair. Previous research conducted by the UCL Jury project, as part of the 2010 study *Are Juries Fair?*, showed that this combination of circumstances exists at present in this country because a small minority of jurors do not follow the rules on juror internet use; most jurors feel they need more information about how they should be conducting deliberations; and many jurors are uncertain or do not know what to do if something improper happens during the trial

The 2010 research provided the first empirical evidence of the extent of juror use of the internet during trial in England and Wales.<sup>10</sup> That research was conducted at court with over 600 jurors in different parts of the country, all of whom had served on a jury and deliberated to reach a verdict. The study found that more

Dinnerstein, (2008) "How Juror Internet Use Has Changed the American Jury". *Journal of Court Innovation* Vol. 1 No.2.; D. Mallard, "Internet Kills Jury" December 3, 2010 cited on [www.matilda.com](http://www.matilda.com); "Juror's iPhone Use Causes Mistrial in Manslaughter Case" Gizmodo Australia, September 17, 2010.

<sup>4</sup> For details of mistrials and discharged juries due to improper juror internet use, see C. Thomas, *Are Juries Fair?*, Ministry of Justice Research Series 01/10 (2010), p.6.

<sup>5</sup> In *Attorney General v Frail (Joanne) and Sewart (Jamie)* [2011] EWCA Crim 1570, the juror (Joanne Frail) was convicted of contempt after contacting a party to the case (Sewart) via Facebook and disclosing information about the jury's deliberations; she was sentenced to eight months imprisonment. In *Attorney General v Theodora Dallas* [2012] EWHC 156 (Admin); [2012] 1 W.L.R. 991; [2012] Crim. L.R. 694, the juror was convicted of contempt after researching the defendant on the internet and then disclosing non-evidential information to other jury members during deliberations; she was sentenced to six months imprisonment.

<sup>6</sup> See *Karakaya* [2005] 2 Cr. App. R. 5 (p.77) at [24].

<sup>7</sup> *Karakaya* [2005] 2 Cr. App. R. 5 (p.77) at [22], quoting Tasker Watkins L.J. in *Thomas*, *The Times*, February 9, 1987.

<sup>8</sup> *Karakaya* [2005] 2 Cr. App. R. 5 (p.77) at [24]. Also see Siobhan Grey "The World Wide Web: Lifeblood for the Public or Poison for the Jury?" (2001) *Journal of Media Law* 3(2).

<sup>9</sup> "Perfect storm" is the meteorological term used to describe an event where a rare combination of circumstances will aggravate a situation drastically. It was first used by US National Weather Service meteorologist, Bob Case, to describe an October 1991 storm off the eastern seaboard of North America. National Oceanic and Atmospheric Administration.

<sup>10</sup> Thomas, *Are Juries Fair?* (2010), Ch.3, p.43–44.

jurors said they saw information about their case on the internet during trial than admitted actually looking for it. In high profile cases<sup>11</sup> 26 per cent of jurors said they saw information about their case on the internet during the trial, while 12 per cent of these jurors said they actively looked for such information during the trial.<sup>12</sup> A similar pattern was also found in standard cases,<sup>13</sup> where 13 per cent of jurors said they saw information about their cases on the internet during the trial but only 5 per cent of these jurors said they actively looked on the internet for this information. It was pointed out in the 2010 report that because these jurors were being asked to admit to doing something they may have remembered being told not to do by the judge, those findings may reflect the minimum numbers of jurors who looked for information on the internet during cases in the period when the study was conducted. The 2010 study also found that, contrary to concerns expressed by some members of the judiciary,<sup>14</sup> it was not primarily younger jurors who were most likely to be accessing the internet to look for information about their case during their time on jury service. The research found that most jurors who accessed information about their case on the internet were over 30 years of age.<sup>15</sup>

Two other jury trial requirements are crucial in preventing improper use of the internet by jurors. The first requirement is that juries know how to conduct deliberations. This requires that jurors know what they need to discuss in deliberations, how to go about reaching a verdict, what would be considered improper behaviour and what to do if something improper occurs during jury deliberations. Research findings from *Are Juries Fair?* raised serious doubts about whether sufficient information is currently provided to juries about the deliberation process. A majority (67 per cent) of jurors who had deliberated to reach a verdict said they would have liked more information about how to conduct their deliberations.

The second requirement is that juries operate on the basis of collective responsibility. In the 2010 Court of Appeal ruling in *Thompson*,<sup>16</sup> which concerned a number of alleged instances of improper internet use by jurors, the Lord Chief Justice highlighted the jury's collective responsibility for the proper conduct of each member of the jury:

“... as soon as the members of the jury have been sworn ... , there is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed. Where it appears that a member of the jury may be misconducting himself or herself, this must *immediately* be drawn to the attention of the trial judge by another, or the other members of the jury ... . The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.”<sup>17</sup>

<sup>11</sup> Long or high profile cases are defined as those lasting over two weeks and/or with substantial pre-trial and in-trial media coverage.

<sup>12</sup> Thomas, *Are Juries Fair?* (2010), Ch.3, p.43.

<sup>13</sup> Standard cases are defined as those lasting two weeks or less with little or no media coverage.

<sup>14</sup> See The Rt Hon the Lord Judge, “Jury Trials”, Judicial Studies Board Lecture, Belfast, November 16, 2010

<sup>15</sup> 81 per cent in high profile cases, see *Are Juries Fair?*, (2010), Ch.3, p.43.

<sup>16</sup> *Thompson* [2010] EWCA Crim 1623; [2011] 1 W.L.R. 200.

<sup>17</sup> *Thompson* [2010] EWCA Crim 1623 at [6.] Also see revised Consolidated Criminal Practice Direction, March 28, 2006, IV.42.6 and IV.42.7 for further guidance to judges on directing the jury about collective responsibility.

What is needed for the system to work is at least one juror on any trial to understand what improper conduct is (including the use of the internet), what to do if the rule is broken (report it to the court before a verdict is returned) and have the willingness to do so.<sup>18</sup> Ideally more than 1 in 12 jurors will understand and follow these rules, but this is the minimum needed to ensure the system operates properly. However, the 2010 study showed that almost half of all jurors (48%) said they would not know or were uncertain what to do if something went wrong during their time serving on the jury.<sup>19</sup> The 2010 research into juror internet use and improper conduct was an initial study. The findings raised a number of questions that could not be answered by that study but are key to determining how best to ensure jurors do not fall foul of the contempt rules and that an effective system of collective responsibility operates on juries across the country.

The UCL Jury Project is currently conducting follow up research at Crown Courts to address these issues.<sup>20</sup> Like the previous study, this new research uses post-verdict surveys with jurors at court who have served on a jury and deliberated to reach a verdict. Post-verdict questioning of jurors in actual cases is valuable because it deals with real juries and real cases. But it also has limitations. Post-verdict studies rely entirely on jurors' self-reported views, perceptions and recollections of their time on a jury. It is well documented that individuals often lack the ability to accurately identify the factors that influence their judgement and behaviour.<sup>21</sup> So these types of studies are not particularly useful for understanding *why* juries reached verdicts. Instead they are most useful when the research is interested in understanding what jurors were aware of, what they did during the time they served on a jury and what their understanding and views are of the jury process. This the focus of the new research.

A post-trial survey was used to gain a deeper understanding of juror conduct by addressing the following questions:

- Exactly how are jurors using the internet in relation to their case during trial?
- What do jurors currently understand improper jury conduct to be?
- What do jurors think they should and would do about improper conduct if it occurred?

In addition it addressed the following questions about jury deliberations:

- Exactly what type of information about conducting jury deliberations do jurors feel they need or would be most useful?
- How helpful are written directions on the law?

The survey was conducted at court immediately after juries returned a verdict. This ensured that there was no lack of recollection due to any time lag between

<sup>18</sup> See *R. v Thakrar* [2008] EWCA Crim 2359 and *Dallas* for examples of jurors reporting fellow jurors for improper use of the internet to the court before a verdict was returned.

<sup>19</sup> Thomas, *Are Juries Fair?* (2010), Ch.3, p.40.

<sup>20</sup> Research funded by the Economic and Social Research Council (Grant No. ES/J000876/1) and conducted by the UCL Jury Project in co-operation with the Judiciary of England and Wales, HMCTS, Ministry of Justice and Jury Central Summoning Bureau and in consultation with the Attorney General, Law Commission and Criminal Cases Review Commission.

<sup>21</sup> R. Nisbett and T. Wilson "Telling More than We Can Know: Verbal Reports on Mental Processes" (1977) 84 *Psychology Review* 231.

the trial and the survey and there was no possibility of outside factors influencing jurors' views or recollections. The survey was completely voluntary, the purpose of the study was explained to jurors in advance and all jurors were guaranteed anonymity. All jurors (100 per cent) who served on the juries covered by the study agreed to participate. This ensured a complete picture of every case in the study. The need to ensure jury anonymity means that specific cases and courts are not identified in this article. The cases (both standard and higher profile) covered a wide range of offences. Some of the high profile cases had been covered extensively in the media over a substantial period of time, and some also had reporting restrictions imposed during the trial. All survey questions were carefully framed to ensure that the jurors could not breach s.8 of the Contempt of Court Act 1981<sup>22</sup> in their answers.<sup>23</sup> The preliminary findings reported in this article are based on surveys conducted with 239 jurors on 20 different trials in 2012–13 in a range of Crown Courts in the Greater London area. Further surveys are currently being conducted with juries in Crown Courts in other court regions outside the South East. The findings will inform the creation of a number of new tools to be piloted at court with jurors to determine the most effective way of educating jurors on the rules on internet use and ensuring incidents of improper jury conduct are reported correctly.

## **Preliminary findings**

This article provides some preliminary findings from stage one of the research. These findings provide initial answers to the following key questions: How do jurors currently understand the prohibition against internet use during trial? Are jurors aware of recent prosecutions of jurors for improper conduct? How are jurors currently using the internet during trial? What kind of deliberation guidance do jurors feel they need? What would jurors do if they became aware of improper jury conduct during trial? How helpful do jurors feel written directions are from the judge?

It is important to emphasise that the findings reported here are from the first stage of a four-stage study. In Stage one, information is gathered from juries about improper conduct, deliberation guidance and judicial directions. This information will then be used in Stage two to develop a range of new materials designed to prevent misconduct and improve deliberations. These materials will be trialled with serving juries at court in Stage three to determine and assess their relative effectiveness in preventing misconduct and improving deliberations. In the fourth and final Stage, a cost assessment will be made for introducing the most effective measures in all jury trials in England and Wales.

Findings from Stage one are being reported here in order to contribute to the Law Commission's consultation process on the possible reform of contempt of court. When all four stages of the jury research are completed the results will provide empirical evidence directly related to a number of proposals made in the

<sup>22</sup> Section 8 of the Contempt of Court Act 1981 makes it a criminal offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations."

<sup>23</sup> A similar methodology was employed in the 2010 research on media coverage of jury trials and juror internet use.

Law Commission Consultation Paper. These include: whether systems should be put in place to make it easier for jurors to report their concerns<sup>24</sup>; proposals for informing jurors before and during jury service about what jurors are and are not permitted to do<sup>25</sup>; whether the juror oath should be amended and reproduced in written form and signed by jurors<sup>26</sup>; whether jurors should be given clearer instructions on how to ask questions during proceedings and encouragement to do so<sup>27</sup>; and whether other preventative measures should be put in place to assist jurors.<sup>28</sup> This article argues that any possible changes to current law and practice should be researched and tested first with actual juries at court before any decision is made about adoption and implementation in all jury trials.

### **Juror understanding of the internet use rule**

As detailed in the Law Commission consultation paper,<sup>29</sup> jurors receive information about internet use at various times once they are summoned and start jury service, including in the introductory juror video (“Your Role as a Juror”) shown to all new jurors and in the speech given by the Jury Manager to all new jurors on their first morning of jury service. If subsequently sworn onto a jury, all jurors are given instructions by the trial judge on juror conduct, including internet use. General guidance is provided to judges in the *Crown Court Bench Book*<sup>30</sup> about what should be covered in this jury instruction. However, each judge will have his or her individual approach to delivering these instructions to juries.

The research conducted with juries at Crown Courts in 2012–13 provided jurors with four different statements about juror internet use and asked each juror to identify which they felt was the most accurate statement. The findings presented in figure one show that almost three-quarters of jurors (73 per cent) do understand the contempt rule in relation to how the internet can and cannot be used when they are serving on a trial. However, almost a quarter of jurors (23 per cent) are clearly confused about the rule on internet use. But they are confused in different ways. Among those jurors who currently do not correctly understand the rule on internet use, 16 per cent believe they cannot use the internet for any reason at all while serving as a juror. Among the other jurors who currently misunderstand the rule, 5 per cent believe there is no restriction at all on their use of the internet during trial, and 2 per cent believe they can look for information about the case as long as they do not let it affect their judgment.

<sup>24</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.91.

<sup>25</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.79–4.82.

<sup>26</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.84.

<sup>27</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.85.

<sup>28</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.92.

<sup>29</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.5–4.16.

<sup>30</sup> *Crown Court Bench Book—Directing the Jury* (2010), *Crown Court Bench Book—Directing the Jury: First Supplement, Crown Court Bench Book Companion* (2011). For details of what specific guidance is suggested to judges in the Bench Book see Law Commission, Ch.4, para.4.12–4.14.

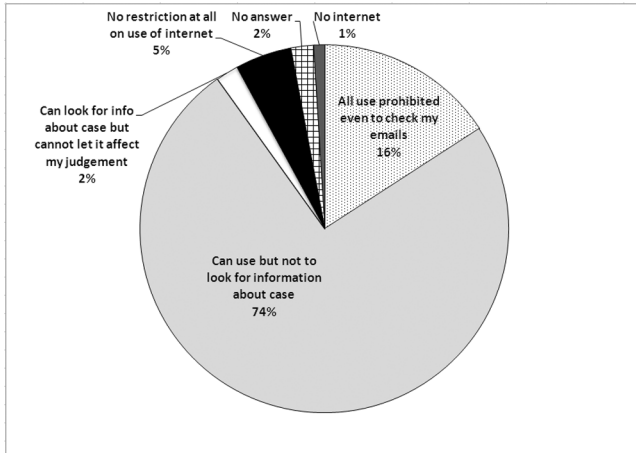


Figure 1: Juror understanding of the rule on internet use (n=239)

Perhaps the most concerning aspect of these findings is that there is a substantial proportion of jurors who now mistakenly believe that serving on a jury means they are prohibited from using the internet *at all* while doing jury service. While such a misunderstanding would have the unintended benefit of ensuring that these jurors will not commit contempt through misuse of the internet during trial, it cannot be right that serving jurors are currently being misled into believing that the internet is not accessible to them simply because they are serving on a jury.

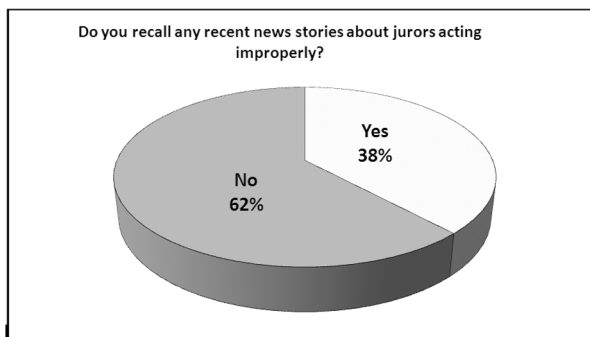
### Awareness of recent prosecutions of jurors

Since the 2010 study there have been a number of prosecutions of jurors for contempt, notably the *Frail*, *Dallas* and *Pardon*<sup>31</sup> cases, which resulted in jurors serving custodial sentences for contempt. There was substantial media coverage of these cases, particularly *Frail* and *Dallas*. Both the Attorney General, who brought the prosecutions, and senior judges, who decided the cases, have indicated that the prosecutions were intended in part to impress on future jurors the serious nature of the rules on juror contempt.<sup>32</sup> In order to establish the extent to which awareness of these prosecutions had filtered out into the wider, jury-serving public, the recent research asked serving jurors whether they were aware of any recent stories about jurors acting improperly.

<sup>31</sup> *Attorney General v Pardon (Stephen James)* [2012] EWHC 3402 (Admin), which did not involve improper use of the internet but did involve a violation of s.8 of the Contempt of Court Act 1981 by the juror (disclosure of jury deliberations) and improper contact with defendants.

<sup>32</sup> In the first case of *Frail*, the Lord Chief Justice states at the outset: “This is a troublesome case and, we must do our best to ensure, an exceptional case.” [1]. In *Dallas* the court (at [41]) cautions that: “Jurors who perform their duties on the basis that they can pick and choose which principles governing trial by jury, and which orders made by the judge to ensure the proper process of jury trial they will obey, or who for whatever reason think that the principles do not apply to them, are in effect setting themselves up above the jury system and treating the principles that govern it with contempt. In the long run any system which allows itself to be treated with contempt faces extinction. That is a possibility we cannot countenance.”, and (at [43]) that: “Misuse of the internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained.” In *Pardon*, the court at [18] states that: “[t]his court has emphasised more than once in the recent past the seriousness with which it will respond to any incident which would serve to undermine this system.”

As figure two illustrates, just over a third of serving jurors (38 per cent) were aware of recent prosecutions of jurors and just under two-thirds of jurors (62 per cent) were not aware of any of the cases. It is interesting to note that a large proportion of the jurors surveyed on this issue served at courts where newspaper articles about both of the *Frail* and *Dallas* cases were posted in the Jury Lounges at the time. A higher proportion of jurors might therefore have been expected to be aware of these stories. But the news clippings were among a very large amount of items posted around the Jury Lounges. This suggests that posting information about internet use in the Jury Lounge or other areas of the court where a large amount of information is already present may be of limited effectiveness. This is a factor that is being considered in the next stage of the research, which will pilot new tools for jurors on improper conduct.



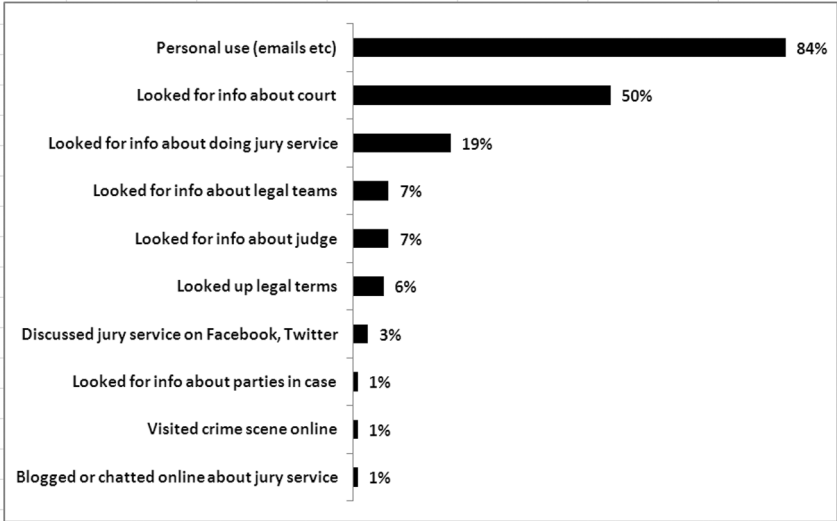
**Figure 2: Juror awareness of recent prosecutions of jurors (n=239)**

### How are jurors using the internet during trial?

The survey also asked jurors how they had used the internet during their time on jury service, presenting jurors with a large range of options from checking personal emails and looking up directions and other details about the court to blogging and tweeting about jury service. This revealed that 78 per cent of all jurors had used the internet in some way during their trial. This finding closely corresponds to the latest ONS figures, which show that 81 per cent of UK households have internet access.<sup>33</sup> Of those jurors who said they used the internet in some way during jury service, (figure three) the two most common uses were to check personal emails or other activities unrelated to their jury service (84 per cent) and to find information about the court where they were serving, (e.g. travel routes, contact details, etc.) (50 per cent). The next most frequent use of the internet during trial was to look for information about what was required of jurors in the course of the trial (19 per cent).

<sup>33</sup> Office for National Statistics, *Statistical Bulletin: Internet Access Quarterly Update, 2012 Q2* (2012). The South East and London have the highest rate of internet users (88 per cent).





**Figure 3: How jurors used the internet during trial (n= 195)**

Only very small proportions of jurors said they used the internet in ways that could potentially be legally problematic. Small proportions of jurors said they discussed jury service online: 3 per cent shared their experience of jury service on social networking sites such as Facebook and Twitter; and 1 per cent blogged or chatted online about doing jury service. These are not necessarily prohibited activities for jurors, but they require jurors to have a clear understanding of the boundaries of allowed and prohibited discussion about jury service. Slightly higher proportions of jurors said they actively looked for information about the legal professionals in their case: 7 per cent looked up information about prosecution and/or defence teams, and a further 7 per cent looked up information about the judge. Again these are not activities that would necessarily result in jurors committing contempt, even though it may not be completely desirable. Those jurors that had the greatest risk of entering into some form of improper juror conduct via the internet were the one per cent who looked up information about parties to the case (other than the defendant), the 6 per cent who looked up information about legal terms used in the case, and the 1 per cent who visited the crime scene on Google Earth, Streetview or other internet sites. It should be borne in mind that this one question in the survey provided jurors with the opportunity to admit to doing something they may have remembered being told not to do by the judge (look on the internet for information about their case). To address this issue, all jurors were assured that any information they provided could not be traced back to them personally and that their honest answers to the questions would help to promote better understanding of how the current rules operate.

## Active searching versus passive awareness

Given that the UK population has the highest level of internet engagement in Europe,<sup>34</sup> it could be argued that these findings demonstrate a remarkable level of self-restraint on the part of the overwhelming majority of jurors. But it is also important to distinguish between jurors seeing information about their case online during the trial (passive awareness) and jurors actually looking for case-related information (active searching). In high profile cases there are likely to be internet news reports that many jurors cannot avoid, especially for jurors who regularly obtain news online or access their emails through websites that contain headline news. This passive awareness is no different from jurors coming across stories related to their case in the print newspapers or on television or hearing reports on the radio. Some jurors may also receive unsolicited tweets about their case if they follow people on Twitter who discuss the case. It could be argued that this is no different than a juror overhearing people talking about their case but not becoming actively involved in the discussion. The internet changes nothing here other than providing the scope for jurors to more easily move from passive awareness of their case to active searching for information about the case. It could be that passive awareness is higher than active searching, but it could also be that passive awareness is easier to admit to than active searching.

Why might jurors look for information about their case on the internet despite court and judicial directions against this? There are three possibilities: (1) jurors do not actually understand the rule against active searching; (2) jurors do not feel they have been given a convincing explanation of the reason for the rules and therefore do not feel obliged to follow the rule; or (3) jurors want to do the best job they can, but they do not feel they have the information to do so and decide to find the information for themselves.<sup>35</sup> The Law Commission Consultation Paper also states that jurors “may already have limited respect for the rules of evidence and the need to approach the case with an unbiased perspective.”<sup>36</sup> But there is currently no evidence to support this. All there is for certain at present is evidence of improper use of the internet by a very limited number of jurors and a lack of understanding about the internet use rule among a quarter of serving jurors. The new research is also examining the extent to which points (2) and (3) provide alternative explanations for jurors’ active searching for information about cases on the internet during trial.

## Prohibited and non-prohibited active searching

Legally, two considerations arise in relation to jurors actively searching for information about their cases: the extent to which active searching can result in a juror violating the contempt rules and the extent to which active searching can provide grounds for a defendant’s successful appeal against conviction. The two prosecutions against jurors in England and Wales for contempt involving improper

<sup>34</sup> UK internet users spend the highest average number of hours per month online (35) and consume the highest average number of pages of online material per person per month (3,205). See *com.Score, Inc. MMX report press release* (August 2011): [http://www.comscore.com/Insights/Press\\_Releases/2011/](http://www.comscore.com/Insights/Press_Releases/2011/) [Accessed March 21, 2013].

<sup>35</sup> See Law Commission, *Contempt of Court: A Consultation Paper* (2012) Ch.2, para.4.21 for examples of these possibilities.

<sup>36</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012) Ch.2, para.2.74.

use of the internet (*Frail* and particularly *Dallas*) indicate that before the Attorney General will pursue a prosecution against a juror for contempt in these circumstances there needs to be clear evidence of a juror's active and intentional research into the parties to the case, coupled with improper disclosure of information to other jury members or third parties.<sup>37</sup> In relation to appeals against conviction, in *Marshall*, Hughes L.J. ruled that a defendant's appeal against conviction would be allowed where evidence emerges that jurors have conducted internet research during the case and "there is any real possibility that the jurors or any of them may have been influenced improperly by this material to convict."<sup>38</sup>

Some types of active searching are clearly permissible. The government and HMCTS encourage jurors to use the internet to look for information about their jury service, providing information on the internet about court locations, transport links, what jury service involves, as well as a dedicated government site where the film "Your Role as a Juror" can be viewed.<sup>39</sup> Then there are the "grey areas" where online activity may not automatically give rise to a prosecution against a juror for contempt or provide the basis for appeal against conviction, but it may be activity that courts would prefer jurors did not take part in. Grey areas include activities such as blogging about jury service, sharing experiences as a juror on Facebook, MySpace, or tweeting about jury service. Here the crucial issue will be the content of what jurors post online about jury service.

The secrecy of the deliberation process is considered a vital aspect of the jury system, and this is enshrined in s.8 of the Contempt of Court Act 1981. But jurors do not take a complete vow of silence when they cross the threshold of the court, nor should they. Involving the public in the justice system has been shown to have substantial civic benefits,<sup>40</sup> and jurors are not prevented from discussing many aspects of their jury service. It is the parameters of what is and is not open to discussion amongst the 12 jurors that appears to need greater clarification for jurors. Other active searching such as looking for information about the judge, prosecution, and defence teams, legal terms or legal aspects of the case raises slightly different concerns. Even though these searches may not necessarily constitute a contempt, courts would generally prefer that jurors refrain from these online activities because it is not possible for the court to know what information the juror may have unearthed and how that information may have influenced their decision-making. This is why it is crucial to identify the best method of conveying to as many jurors as possible what the boundaries are for active searching for information during the trial. But this lack of a clear distinction between prohibited and allowable active searching is also what makes conveying this message more difficult.

<sup>37</sup> D. Grieve, *Trial by Google? Juries, social media and the internet*, Speech at University of Kent, February 6, 2013, available at <https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet> [Accessed March 21, 2013].

<sup>38</sup> *Marshall* [2007] EWCA Crim 35 at [12]; [2007] Crim. L.R. 562. In that case material printed from various internet sites was found in the jury deliberating room after verdicts were returned. The material discussed the practice of charging in sentencing on a range of offences covered in the case.

<sup>39</sup> See <https://www.gov.uk/jury-service/overview> [Accessed March 21, 2013] and [http://www.hmcourts-service.com/infoabout/jury\\_service/index.htm](http://www.hmcourts-service.com/infoabout/jury_service/index.htm) [Accessed March 21, 2013].

<sup>40</sup> See for instance, S.P. Garvey, et al, "Juror First Votes in Criminal Trials" 1 *Journal of Empirical Legal Studies* 371 (2004).

## Reform of contempt and the future of digital communications

It is digital communications and not the internet per se that has produced new challenges for jury trials. These issues have been around for two decades now, despite the fact that they have only become the focus of attention in the last few years. Issues over digital communications and the conduct of jurors in trials go back to 1993, when an appeal against a jury conviction was made based on a juror's use of his mobile phone while the jury was deliberating.<sup>41</sup> If there is to be any change to the law of contempt in relation to juries, it should attempt to take into account how digital communications are likely to develop at least in the not too distant future. Yet this presents a major challenge to law reformers. In relation to technology it remains true today that "We look at the present through a rear-view mirror. We march backward into the future."<sup>42</sup> What is increasingly clear is that, as internet-enabled devices develop they will be more active in providing information to owners. In what Gelernter describes as the coming transformation of the world wide web to the "world stream", searching will be radically changed: from the current approach of "let me rummage around and see what I can find" to the provision of made-to-order information that is based on "bring me what I want".<sup>43</sup> This means that in future juror contempt is much more likely to revolve around jurors' passive awareness of and not active searching for information about their cases. Jurors will not need to actively search for information about their case, the "world stream" will be able to predict a juror's potential interest in a case and send unsolicited information to the juror about it. Yet the discussion around reform of the contempt laws in relation to juror use of the internet is based primarily on the existing internet search model. A recent Ofcom report<sup>44</sup> revealed that the United Kingdom has the highest use of mobile devices for data accessing in the world. If this high level of data accessing from mobile devices continues in the United Kingdom, this suggests that passive awareness of case information may be more likely in future to affect jurors here than in some other jurisdictions.

### Does the internet have a silver-lining?

It should also be remembered that some improper juror conduct that would have gone unnoticed in the past is now being revealed by the very existence of the internet and digital communications. In the *Frail* case, evidence of the improper Facebook contact between the juror (Frail) and the former defendant (Sewart) came initially from Sewart's solicitor and counsel who reported it to the court following their client's disclosure. But it was the concrete evidence of the details of the discussion between Frail and Sewart on Facebook that provided incontrovertible evidence of the violation of s.8 by both Frail and Sewart. Had Frail approached Sewart in person and had the same conversation, the contact may never have come to light. Even if Sewart subsequently reported the contact to her legal team who reported it to the court, it may not have been possible to know exactly what the two women said to each other. But conducted via Facebook,

<sup>41</sup> *McCluskey* 1994 Cr. App. R. 216.

<sup>42</sup> M. McLuhan and Q. Fiore, *The Medium is the Massage: An Inventory of Effects* (New York: Random House, 1967).

<sup>43</sup> D. Gelernter, "The End of the Web, Search, and Computer as We Know It" *Wired*, January 2, 2013.

<sup>44</sup> Ofcom, *International Communications Market Report*, December 13, 2012

exact and full details of the discussion were available as evidence. In other cases of alleged improper juror use of the internet during trial, it is possible to obtain mobile phone and internet access records which can help determine the nature of a juror's digital communications and whether any contempt occurred.

### **Achieving behavioural change in juror internet use**

There have been numerous suggestions made for how to achieve behavioural change in jurors over their internet use during trial. These range from new warnings from trial judges and warnings given in writing as well as orally; to publicity attached to contempt sanctions against jurors found to have ignored the warnings, as well as written undertakings by jurors that they understand the warning and agree to abide by it.<sup>45</sup> Others have suggested that a Jury Monitor be appointed to sit in all deliberations and ensure no internet misuse occurs.<sup>46</sup> Some jurisdictions have gone as far as creating a new criminal offence of jurors intentionally seeking information,<sup>47</sup> and the Law Commission has invited views from interested parties on whether a similar tactic (and other measures) should be adopted in this jurisdiction.<sup>48</sup>

Some of the suggestions for achieving behavioural change in jurors are simply impractical, and while others may be feasible, they are all premature. The suggestion of a Jury Monitor is an impractical proposal. If jurors know they are not supposed to use the internet to research the case, they will be highly unlikely to say anything in deliberations about this while a Jury Monitor is present. Instead it is likely to lead to and encourage further improper juror conduct by encouraging discussion among jurors outside the jury room. Too often proposals for change are based on anecdotal claims about jury problems or single high profile or exceptional cases.<sup>49</sup> Soliciting the views of lawyers, judges, the media and other interested parties is also not a sufficient means of addressing the issue. In the past seeking views of "interested parties" resulted in the decision not to provide information to jurors about what constitutes improper conduct for fear it may confuse jurors or make them do precisely what they were being advised not to do.<sup>50</sup> The crucial question for all proposed changes must be whether there is any empirical evidence that such changes would actually achieve behavioural change in jurors. Stages two and three of the research currently being conducted with juries at Crown Courts in this country are designed to produce precisely this evidence.

<sup>45</sup> See Editorial, "Jurors and the Internet" [2011] Crim. L.R. 591.

<sup>46</sup> C. Murdoch "The Oath and the Internet", *Criminal Law and Justice Weekly*, Vol. 176, March 10, 2012.

<sup>47</sup> California and a number of states in Australia have done so. See 2011 California Laws Chapter 181 (passed August 5, 2011). Also see Law Commission, Ch.4, para.4.36–4.37.

<sup>48</sup> Law Commission Ch.4, para.4.36–4.40. Also see para.4.74 for further suggested preventative measures.

<sup>49</sup> The recent attacks on trial by jury and calls for fundamental change following the hung jury in the first trial of Vicky Pryce demonstrate the danger of such an approach. Empirical evidence shows that this jury was highly exceptional, as hung juries only occur 0.6 per cent of the time when juries deliberate. Thomas, *Are Juries Fair?* (2010), Ch.3, p.46.

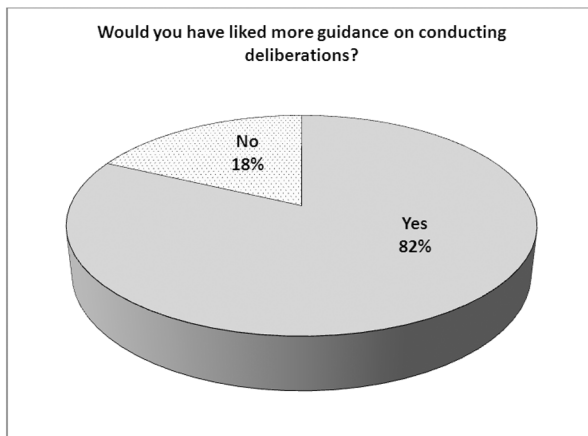
<sup>50</sup> In 2005 after a consultation process and discussions with the senior judiciary, the Government concluded that further guidance about what constituted improper jury conduct and how and when to report it might only confuse the issue and run the risk of causing jurors unnecessary anxiety about what they can and cannot do. Department for Constitutional Affairs, *Jury Research and Impropriety*. Consultation Paper, CP 04/05.

## Jury deliberations

As well as understanding the rule on internet use, jurors' understanding of what is required of them in the deliberating room is another crucial factor in avoiding a "perfect storm" of juror contempt. In the 2010 study 67 per cent of jurors said they would have liked more information on conducting deliberations.<sup>51</sup> The Court of Appeal in *Thompson* addressed this finding, stating that:

"What is needed is guidance from the judge which reminds the jury that each member has an equal responsibility for the verdict, that it is inevitable that different views will be expressed about different features of the case, and there must be reasonable give and take between the members of the jury, with an opportunity for each to be heard and his or her opinions considered. No formula can be prescribed."<sup>52</sup>

Trial judges now routinely provide the type of deliberation guidance to jurors recommended by the court in *Thompson*,<sup>53</sup> but the current research shows that jurors' desire for deliberation guidance has not been satisfied by this and has actually increased since 2010. In the most recent study the proportion of persons saying they would like more guidance on how to conduct deliberations increased to 82 per cent (figure four).



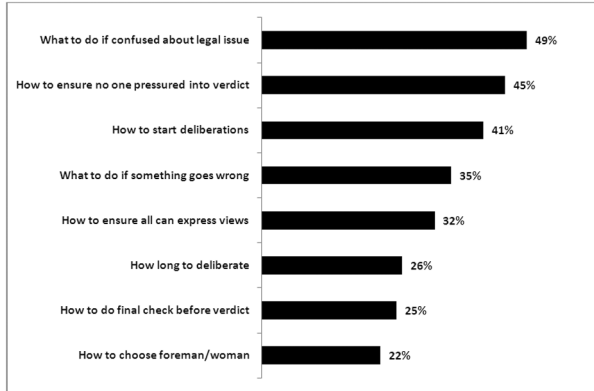
**Figure 4: Juror desire for deliberation guidance (n=239)**

This provides clear evidence that the approach suggested in *Thompson* has not alleviated the problem, and now almost all jurors who take part in deliberations feel they are currently not provided with the level of information they want and need about how to conduct jury deliberations. Unlike the 2010 study, this study was able to explore with jurors exactly what type of deliberation guidance they felt they would have benefited from receiving. The findings show that jurors would like more guidance about numerous aspects of jury deliberations (figure five).

<sup>51</sup> Thomas, *Are Juries Fair?* (2010), Ch.3, p.39.

<sup>52</sup> *Thompson* [2010] EWCA Crim 1623 at [10]

<sup>53</sup> *Crown Court Bench Book—Directing the Jury: First Supplement, Crown Court Bench Book Companion* (2011), s.18A, p.143.



**Figure 5: What deliberation guidance would have been helpful? (n = 201)**

It is of some concern that two aspects of deliberations where jurors feel they need more guidance are: what to do if they are confused about a legal issue (49 per cent) and what to do if something goes wrong during deliberations (35 per cent). Both of these are crucial elements in ensuring proper deliberations and preventing a perfect storm of jury contempt. The other two areas where jurors have the greatest need for guidance is in how to ensure that jurors are not unduly pressured into reaching a verdict (45 per cent), and how to start deliberations (41 per cent). The second of these (starting deliberations) suggests that providing juries with general deliberation guidance could help to reduce the time juries take to deliberate, which would have efficiency and cost benefits. These findings will help shape the next stage of the research, which will trial deliberation guidance with juries at a number of Crown Courts and assess the guidance effectiveness in meeting jury needs.

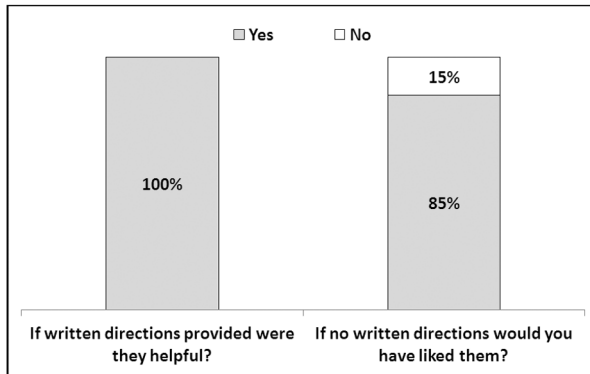
**Guidance on the law and written directions**

The 2010 research revealed that while most jurors felt judges’ oral directions on the law were easy to understand, their actual retention of specific legal directions was low unless the judge’s oral directions were also accompanied by a written summary of the law to be applied in the case.<sup>54</sup> Since those findings were published there appears to be a growing use of written directions by judges when directing juries on the specific law to be applied in individual cases. But no reliable data exists on how many judges use written directions and how often they are used.

The jurors in the 2012–13 study were asked whether or not they had received written directions on the law from the judge. If they had received written directions, they were then asked whether they found the written directions helpful or not. If they had not received written directions they were asked whether they would have found written directions helpful. Among the 70 per cent of juries that received written directions on the law in their case (figure six), every single juror who served on these juries (100 per cent) said they found the written directions helpful. Among the 30 per cent of jurors who did not receive written directions, 85 per cent said

<sup>54</sup> Thomas, *Are Juries Fair?* (2010), Ch.3, p.38.

they would have liked written directions to consult when deliberating. Further research is being conducted on these issues, but it is hard to interpret these findings as indicating anything other than juries want judges to provide them with directions on the law in writing along with their oral directions. These findings are also relevant to the piloting of Deliberation Guidance to jurors that will take place in stage two of the study. The limited deliberation guidance jurors currently receive is delivered verbally by the judge, and these findings strongly suggest that any new guidance needs to be piloted in written form as well.



**Figure 6: Jurors' view of written judicial directions (n=239)**

## What would jurors do if something went wrong?

In *Thompson* the Court of Appeal called for an assessment of how best to ensure that collective responsibility operates in jury trials.<sup>55</sup> The 2012–13 research addresses this by examining the final element necessary in preventing juror contempt: ensuring that jurors understand what constitutes improper juror conduct and what they need to do if it occurs. It did this by exploring the extent to which jurors are likely to report different forms of improper juror behavior and, if they are, to whom they are most likely to report this. Each juror was asked to indicate what she or he would do if six different types of improper conduct occurred when serving on the jury. All of the scenarios were based on actual occurrences in jury trials and included: being approached outside court by someone connected to the case or being aware that a fellow juror had been approached; discovering that a fellow juror had found information about the case not presented in the trial; seeing a fellow juror using a mobile phone during the trial; jurors being pressured into reaching a verdict or being preventing from expressing their views in deliberations.

The findings show that jurors are most likely to report instances to the court of potential jury tampering. Almost all jurors would do exactly what they need to do (inform the jury manager, usher or judge) if someone involved in the case tried to speak or contact them personally (92 per cent) or if they saw someone associated with the case speaking to a fellow juror (94 per cent). Jurors are less likely to report instances of fellow jurors finding information out about a defendant that is not

<sup>55</sup> *Thompson* [2010] EWCA Crim 1623 at [7].



disclosed in the trial, juror use of a mobile phone in court during the trial, or different types of pressure exerted on jurors during deliberations. The two scenarios where the highest proportion of jurors said they would not feel comfortable doing anything at all related to contempt and new media. If a juror introduced additional information into deliberations that had not been presented in the trial, 14 per cent said they would not do anything about it because they did not feel comfortable doing so. If a juror used a mobile phone in court 10 per cent would not feel comfortable reporting it. When it comes to inappropriate conduct of fellow jurors to each other in the deliberation room, this is where jurors feel most comfortable dealing with the situation themselves and speaking directly to a juror who may be acting inappropriately. If a juror was unduly pressuring another juror to reach a verdict 39 per cent of jurors would speak to the juror concerned or other jurors about it; if one juror was not giving another juror the chance to express a view about the case in deliberations 46 per cent of jurors said they would deal with this internally by speaking to the juror concerned or other jurors about it.

These findings present substantive evidence that jurors need better instructions on what, how and when to report concerns to the court. It is also important to emphasise one consistent finding in this part of the study, regardless of the scenario involved. The results clearly show that two points of contact for juries are crucial in preventing juror contempt and ensuring that any evidence of improper conduct is brought to the court's attention. Ushers and jury managers (not judges) are the court officials jurors feel most comfortable reporting any concerns to about improper conduct. In all six scenarios, it was the jury managers and ushers that the overwhelming majority of jurors said they would go to if they were going to report anything they felt might be wrong. This finding has important implications for staffing in the Crown Courts, and highlights the need to ensure that these positions are properly staffed, resourced and trained in all Crown Courts in England and Wales.

## **Stage 2: Piloting new juror tools and assessing court practices and facilities**

These findings from stage one of the research project will form the basis for developing new materials and practices that will be piloted with jurors at court. In stage two the research is focused on how best to achieve behavioural change by increasing juror understanding of the rules on contempt and improper conduct. This includes establishing the best means of improving juror understanding and compliance with the rule on internet use outside of court. The UCL Jury Project is also conducting a review of the facilities and practices at Crown Courts which impact on improper juror conduct at court.

The Law Commission Consultation Paper poses a number of questions about court practices and how they might be altered to help reduce the chance of improper internet use by jurors while at court. Some of the proposed practices need little debate, for instance that internet-enabled devices should always be removed from jurors while in the deliberating room.<sup>56</sup> However, the real issue here is how to ensure that there are appropriate and sufficient numbers of facilities at court for

<sup>56</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.89.

storage of these devices. For instance, some Crown Courts already have small safes for each deliberating room for storing mobile phones during jury deliberations, which were installed several years ago. But they are now not large enough to hold laptops, iPads and other internet-enabled devices which jurors increasingly bring to court.

In addition, the Commission asks whether internet-enabled devices should not automatically be removed from jurors throughout their time at court.<sup>57</sup> The Commission is right to suggest that this is not an effective approach. It is only while jurors are in court, temporarily in waiting outside of court or in deliberations that internet-enabled devices need to be stored away. It would be unreasonable to withhold these devices from jurors when they are simply waiting in the Jury Lounge for extended periods of time. The Commission also poses questions about the role of the judge in managing juror access to these internet-enabled devices while at court, questioning whether judges should have the power to require jurors to surrender their devices<sup>58</sup> or whether any decisions about surrendering them at court should be left to the discretion of the judge.<sup>59</sup> Leaving these issues to the discretion of the judge instead of establishing standard operating practices in all Crown Courts is only likely to breed inconsistent practices at courts. It is also likely to be more effective if the policies are court (not judge) based given what the recent research has shown about jurors' greater willingness to discuss conduct issues with jury managers and ushers, rather than with judges.

## Trusting the jury

Any consideration of reforms to the contempt laws, court practices in relation to jurors and judicial directions requires a consideration of why we continue to have trial by jury and what value accrues from this practice. De Tocqueville felt that to: "regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still."<sup>60</sup> The empirical evidence from jurors today in this country bears this out. The overwhelming majority of jurors have a very positive view of the criminal justice system and trial by jury at the end of their jury service. Among the jurors who took part in the 2010 research, 77 per cent felt that trial by jury was fairer than trial by judge alone and 81 per cent said they would be happy to do jury service again if they were summoned.<sup>61</sup>

But in the absence of reliable empirical evidence, the debate over controlling juror contempt in the face of new media has become polarized around two extreme positions: either "the sky is falling" position advocated by those who feel that the jury system is doomed in the new media age or the "let's just blindly trust the jury" position advanced by those who believe there is no need to try and control juror access to information in the new media age. The doomsday scenario suits those who would perhaps prefer to see an end to trial by jury, and who have a lack of faith in non-legally trained persons adjudicating criminal cases. The blind faith

<sup>57</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.87.

<sup>58</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.88.

<sup>59</sup> Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch.4, para.4.90.

<sup>60</sup> A. de Tocqueville, *Democracy in America*, Ed. J.P.Mayer, Trans. George Lawrence, (Doubleday Anchor 1969), p.272.

<sup>61</sup> Previously unreported findings from *Are Juries Fair?*

approach suits media outlets in particular who would prefer not to have any restrictions on what they publish.<sup>62</sup> It is not just that we must (or must not) “trust the jury”.<sup>63</sup> It should be that we must give the jury the best tools to do their job to the best of their ability—and then we must trust the jury to do that job. Blind trust in juries is not just misguided; it is not what juries want themselves. The research reported here has shown that jurors are clearly asking for more and better guidance to do their job, they are being clear about what they want and they are being clear that they would like it in written form.

### **Three-pronged approach to minimising juror contempt**

Given what has been revealed by the first stage findings of the new research, it appears that the most effective approach to minimising juror contempt in the new media age is to adopt a three-pronged strategy. The first approach is to reform court practices and facilities to control juror use of internet-enabled devices while physically in the courtroom and in the deliberating room. Establishing clear court practices and providing proper facilities at all Crown Courts to avoid contempt occurring at court is the most straightforward approach to minimizing juror contempt. The only issue to be considered here is cost. The second approach is to take an empirical approach to behavioural change in jurors. The reality is that the only chance of achieving behavioural change is to find out what jurors currently understand the internet use rule to be; establish the extent of any lack of understanding or non-compliance; explore jurors’ view of the deliberation process and identify what they want and need; then use this information to test out various new methods for conveying the information to jurors and systematically assess which methods work best.<sup>64</sup> Changing juror behaviour to reduce improper conduct to a minimum may be more complex than reforming court practices and facilities, but it is what the current research is designed to achieve. Finally, if court practices and facilities are reformed and standardized and behavioural change in jurors is achieved, then less emphasis would need to be placed on legal restrictions over online content. Some legal restrictions would need to remain, but this should lead to a reduced need for overly severe (and probably ineffective) external controls. But this strategy requires solutions that are firmly based on empirical evidence. These solutions are also not focused solely on juror internet use. Juror misuse of the internet during trial has highlighted some lack of understanding about the contempt rules among jurors, but internet use is not the only issue involved in juror contempt.

<sup>62</sup> The Attorney General, Dominic Grieve, described this approach: “A total relaxation on what can be published should they argue follow and the Jury, it is claimed, can be trusted to decide the case on what they hear in court.” Speech to the Kalisher Scholarship Trust, 12 October 2010.

<sup>63</sup> Lord Phillips of Worth Matravers, “Trusting the Jury” Criminal Bar Association Kalisher Lecture, October 23, 2007

<sup>64</sup> This means that it is premature to resolve a number of possible options covered in the Law Commission’s Consultation Paper, including whether the juror oath should be amended and whether jurors should be required to sign it. Stage two of the research project will pilot these options and determine how they affect jurors. They may prove not to be necessary and may even be ineffective or counterproductive.

## Myth of section 8

It has been claimed that “The true extent of jurors using the internet today cannot be known as the Contempt of Court Act 1981 prevents research into jury deliberations.”<sup>65</sup> This is simply untrue. Section 8 of the Contempt of Court Act 1981 makes it a criminal offence to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations.” For over three decades since it was introduced, commentators have routinely and incorrectly claimed that s.8 makes research with actual jurors impossible if not illegal in this country. It is now a well-entrenched and unfounded myth that s.8 “unnecessarily inhibits research”.<sup>66</sup> This myth is compounded by a misunderstanding about what s.8 does and does not allow. Section 8 prevents one specific thing: individual jurors in individual cases telling someone outside the jury what they or their fellow jurors said in their deliberating room. The main error people make about s.8 is to think that if only it was possible to ask jurors what was said in deliberations (or hear what was said) this would explain how the jury system works. But this fundamentally misunderstands how juries and jury research works. Researchers having access to jurors’ deliberations will not be able to determine the true extent of juror use of the internet today. Believing it can illustrates a misunderstanding of what observations or recordings of jury deliberations can achieve.<sup>67</sup>

In the last decade, research conducted within the boundaries of s.8 and with actual jurors at court in England & Wales has been able to examine all of the following fundamental aspects of the jury system: the operation of juror summoning; selection and empanelling of juries; representative nature of jury service; public willingness to do jury service; perceptions of fairness of juries versus professional judges; racial bias in jury trials; jury conviction rates; juror understanding of the jury process; juror comprehension of legal directions; impact of media coverage of jury trials; juror use of the internet during trial and other forms of improper juror conduct.<sup>68</sup> Those who would remove s.8 prohibitions against the secrecy of the jury room also need to address the clear and strong views of jurors themselves on this issue. Research has shown that almost all jurors (82 per cent) feel strongly that they should not be allowed to speak about what happens in deliberations.<sup>69</sup> Any reform of the law of contempt as it relates to juries should be based on reliable empirical evidence about what jurors do, what they think and what helps them do their job to the best of their ability. Nothing in the current law prevents jury research in this country that will help achieve this.

## Conclusion

It is impossible to externally monitor all internet use by jurors during trial. Therefore the proper functioning of the jury system depends not on blind faith in the jury or

<sup>65</sup> G. Daly and Dr I. Edwards, “Juror Online”, *Criminal Law and Justice Weekly*, April 25, 2009.

<sup>66</sup> In the consultation paper, the Law Commission poses the question “Does s.8 unnecessarily inhibit research?” Law Commission, *Contempt of Court: A Consultation Paper* (2012), Ch. 4, para.4.62.

<sup>67</sup> For a fuller discussion of the myth of s.8 and jury research see C. Thomas, “Exposing the Myth”, *Counsel*, April 2013.

<sup>68</sup> These issues were all examined with real jurors in two studies: C. Thomas, *Diversity and Fairness in the Jury System in England and Wales* (2007) and Thomas, *Are Juries Fair* (2010)

<sup>69</sup> Thomas, *Are Juries Fair* (2010), Ch.3, p.40.

in abandoning efforts to address juror misconduct but on three crucial things. First, jurors need to understand what improper jury conduct is. Secondly, jurors need to clearly understand that if a fellow juror uses the internet improperly or if any improper conduct occurs it must be reported to the court. And thirdly, jurors must understand exactly how and when to report improper jury conduct and be provided with guidance that enables them to do so with ease. Ensuring that trial by jury can effectively operate in the new media age, therefore, requires empirical evidence about what jurors do, what they think and what are the best tools to provide them with to do their job to the best of their ability. Most jury reforms in the past have been based on anecdotal evidence and high profile or exceptional cases. When this happens it means reforms can be based on false assumptions and, as a consequence, they may not achieve their ends or may even have counter-productive effects. Answers to the questions posed by the Law Commission in its consultation paper need to avoid these pitfalls and be based on concrete evidence about juries in England and Wales. Contrary to popular myth, the existing provisions of s.8 of the Contempt of Court Act present no barrier to conducting rigorous and reliable empirical research with actual juries in this country. There is therefore no reason why reform of the law of contempt in relation to juries should not be based on such evidence.